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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

MCCLATCHY NEWSPAPERS d/b/a
THE SACRAMENTO BEE,
Petitioner,

VS.

CENTRAL VALLEY TYPOGRAPHICAL UNION No. 46,
INTERNATIONAL TYPOGRAPHICAL UNION,
Respondent.

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether the court below properly affirmed the district court's confirmation of the Eaton labor arbitration award.

2. Whether the court below applied the proper legal standard for confirmation of arbitration awards by requiring merely that the decision constitute a "plausible interpretation," rather than by examining the arbitrator's words to determine whether the decision drew its essence from the collective bargaining agreement.

PARENT COMPANY AND SUBSIDIARIES

McClatchy Newspapers

Nor Cal Cablevision, Inc.

Anchorage Daily News, Inc.

Telcab Communications, Inc.

Legi-Tech

All other subsidiaries of McClatchy Newspapers are wholly-owned.

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CENTRAL VALLEY TYPOGRAPHICAL UNION No. 46,
INTERNATIONAL TYPOGRAPHICAL UNION,
Respondent.

Petition For A Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner McClatchy Newspapers, d/b/a The Sacramento Bee ("Publisher" or "Petitioner") petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit, which affirmed a judgment of the United States District Court for the Eastern District of California confirming an arbitration decision by Arbitrator Eaton. The Respondent is the Central Valley Typographical Union No. 46, International Typographical Union ("Union" or "Respondent").

In that opinion, the United States Court of Appeals for the Ninth Circuit also vacated the district court's amended order and judgment which, in addition to confirming the

arbitration award, contained additional findings and directives that went beyond the arbitrator's decision as well as the district court's initial judgment. Petitioner claims error only as to the Ninth Circuit's affirmation of the district court's confirmation of the arbitration award. No error is claimed in the Ninth Circuit's vacation of the amended order and judgment of the district court.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, filed on July 14, 1982, is not yet reported. It is reproduced *infra* in Appendix A ("App.") at pp. A1-A10. That opinion was amended by order of the court of appeals filed on September 22, 1982. That order, issued September 22, 1982, is also not reported. It is reproduced *infra* (App. B, pp. B1-B2).

The judgment of the United States District Court for the Eastern District of California, which was affirmed by the court below is not reported. It is reproduced *infra* (App. C, pp. C1-C2).

The decision of Arbitrator Eaton which was confirmed by the district court is reproduced *infra* (App. D, pp. D1-D24).

JURISDICTION

The opinion (App. A) of the court of appeals was filed on July 14, 1982. That opinion was modified by order of the court of appeals in ways not germane here, on September 22, 1982, which order (App. B) also denied the Publisher's petition for rehearing and suggestion for rehearing *en banc* and the Union's petition for rehearing and clarification. Mandate was stayed by the court of appeals by order issued on October 4, 1982 staying mandate pending filing, consideration and disposition by

the Supreme Court of the instant petition for writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185 is set forth at App. E, *infra*, pp. E1-E2.

STATEMENT OF THE CASE

Petitioner is a California corporation publishing The Sacramento Bee. Prior to 1978, Petitioner had entered into successive collective bargaining agreements with Respondent which represented The Sacramento Bee composing room employees. The Petitioner also had collective bargaining and contractual relations with Respondent's sister union, the Sacramento Mailers Union, Local 31, International Typographical Union ("Mailers Union"), covering The Sacramento Bee mail room employees.

In 1973, the Petitioner contemplated certain technological changes in the composing room operations and engaged in collective bargaining with Respondent concerning these contemplated changes. The collective bargaining culminated in a memorandum of agreement commonly known as the "Scanner Agreement" which, *inter alia*, provided for the assignment of certain work to members of Respondent and a guarantee of lifetime employment to certain members appearing on lists attached to the Scanner Agreement. These job guarantees were neither absolute nor unconditional and could be lost under circumstances other than technological layoff. For example, the Scanner Agreement provided that:

> In case of a strike . . . such employment guarantee shall immediately cease and continuance of this Agree-

> ment will be contingent upon the terms of a negotiated strike or lockout settlement. . .

On December 31, 1976, the Petitioner's separate collective bargaining agreements with Respondent and the Mailers Union expired. By mid-1978, Petitioner and Respondent reached an agreement on wages and hours and working conditions of the composing room employees of The Sacramento Bee, for the period January 1, 1976 through and including December 31, 1979. Unfortunately, no new agreement was reached with the Mailers Union. On at least two occasions prior to the parties' April 1978 agreement, Petitioner's bargaining representatives warned the Union's representatives that if the Union's members honored the picket line of the Mailers Union, then the Respondent's members would be on strike, and in accordance with the Scanner Agreement, would lose their job guarantees. Significantly, the Respondent's bargaining representatives neither disputed this admonition nor contested these interpretations of the Scanner Agreement by Petitioner. Indeed, it is undisputed in the record that all of the Union's representatives remained silent in the face of these statements by Petitioner's representatives and actually agreed with the comments of the Petitioner's negotiators that honoring the Mailers' picket line would terminate the job guarantees.

On April 17, 1978, the Mailers Union struck The Sacramento Bee. Petitioner's president, Joseph O'Brien and other Union representatives directed Respondent's membership to leave their work stations and observe the Mailers' picket line. Some of the composing room employees named in the Scanner Agreement left their work stations prior to quitting time and subsequently refused to cross the

picket line. Some also joined in the Mailers' picketing activities.

The Petitioner asserted that these activities by Respondent's membership terminated the job guarantees of the Scanner Agreement. The Union disagreed. The parties submitted the question to arbitration before Arbitrator Eaton, where the stipulated issue for the arbitrator was:

> [w]hether the job guarantees provided in paragraph 1 of the 1973 Memorandum Agreement between the Sacramento Bee and Central Valley Typographical Union # 46 ceased for any or all of the employees covered by that agreement by reason of the strike which began April 17, 1978.

On August 10, 1979, the arbitrator issued his decision wherein he noted that the parties' 1973 Scanner Agreement provided that in case of a "strike", the employment guarantees would cease and continuance of the Scanner Agreement would be contingent upon the terms of the "negotiated strike . . . settlement." Based solely on the single, isolated and totally unsupported reference to a "negotiated strike settlement," the arbitrator concluded that it was only after a "primary" strike that the terms of a "strike settlement" could be "negotiated," and because the Union's membership had not engaged in a "primary" strike, their job guarantees had not ceased by reason of the April 17 strike.

Ruling upon the Petitioner's complaint to vacate that arbitration award as well as the Respondent's cross-complaint to confirm, the United States District Court for the Eastern District of California confirmed the arbitration award, and the Petitioner appealed.

Subject matter jurisdiction was conferred upon the district court by Section 301 of the Labor-Management Relations Act, as amended (29 U.S.C. § 185), Petitioner being engaged in commerce and operations affecting commerce within the meaning of Sections 2(6) and 2(7) of the National Labor Relations Act and Section 301 of the Labor-Management Relations Act, as amended (29 U.S.C. §§ 152(6), 152(7) and 185, as well as because employees involved worked in an industry affecting commerce as defined in Section 2(5) of the National Labor Relations Act, as amended (29 U.S.C. § 152(5)). The Petitioner appealed the district court's confirmation of the Eaton arbitration award and that case was docketed Case No. 80-4597 with the Ninth Circuit.[1]

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[1]While appeal from the original judgment confirming the arbitration award was pending, the district court entered an amended judgment which reaffirmed the original one and also went beyond the issue submitted to the arbitrator and directed the Publisher to reinstate certain striking employees. The Publisher appealed that amended judgment as well, and it was assigned Case No. 81-4117 at the Ninth Circuit Court of Appeals. On July 14, 1982, the Ninth Circuit Court of Appeals vacated that amended judgment as being rendered without jurisdiction. The Publisher does not claim that the Ninth Circuit committed error in vacating the amended judgment in Case No. 81-4117, but rather, this petition deals solely with the Ninth Circuit's affirmation of the district court's confirmation of the underlying arbitration award.

REASONS FOR GRANTING THE WRIT

I

THE LEGAL STANDARD UTILIZED BY THE NINTH CIRCUIT COURT OF APPEALS IN CONFIRMING THE ARBITRATION DECISION IS IN CONFLICT WITH THE STANDARD UTILIZED BY FIVE OTHER CIRCUIT COURTS OF APPEALS

The error claimed in this case on the part of the Ninth Circuit is not complex, but it is extremely important. That is, in affirming the district court's confirmation of the arbitration award, the Ninth Circuit Court of Appeals simply applied the wrong legal standard, a standard which is, in several respects, in conflict with the decisions of the First, Fourth, Sixth, Eighth, and Tenth Circuit Courts of Appeals. A review of the opinion of the court below (App. A) reveals that, without examining the arbitrator's words or the underlying record, the court merely determined that the arbitrator's decision represented a "plausible interpretation of the contract." According to this standard, so long as an arbitration decision's "bottom line" represents an interpretation that is "plausible," the decision is entitled to enforcement without reference to the means the arbitrator used, or to the bases for the arbitrator's decision.

This extremely limited standard of review understates the court's obligation to engage in a meaningful review of arbitration decisions, that is, to examine the arbitrator's words carefully to be certain that the arbitrator remained faithful to his duty to interpret and apply the collective bargaining agreement. By using this "bottom line" approach, the Ninth Circuit denied the Publisher the meaningful review of the arbitration decision to which it was entitled, and rendered a decision contrary to various courts

of appeals which have enunciated far stricter standards for award confirmation. It cannot be doubted that the underlying issue herein, *i.e.*, the standard to be applied by courts in confirming labor arbitration awards, is of great importance to this country, and to its policy favoring voluntary arbitration as the preferred means of settling industrial disputes and avoiding industrial strife. *See United Steelworkers of America v. Enterprise Wheel And Car Corp.*, 363 U.S. 593 (1960). Moreover, national uniformity in such matters is necessary. *See Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). Accordingly, the exercise of this Court's power of supervision is necessary so that the courts throughout this country will apply a uniform standard in this important area.

The disagreement among the circuits no doubt comes in part from the lack of specific guidance from this Court. Thus, in *United Steelworkers of America v. Enterprise Wheel And Car Corp., supra*, this Court stated the limited role of labor arbitrators as follows:

> . . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

363 U.S. at 597. It is clear that labor arbitration awards are legitimate only to the extent that they draw their "essence" from the collective bargaining agreement. How-

ever, the difficulty in applying this standard has resulted in varying degrees of scrutiny among the various courts of appeals.

A. The Opinion Of The Court of Appeals Conflicts With Decisions Of The Fourth, Sixth, Eighth, And Tenth Circuits, Which Deny Enforcement To Arbitration Awards Where the Arbitrator Has Ignored His Own Factual Findings.

The standard applied by the Ninth Circuit on review of labor arbitration decisions, confirming arbitration awards if they are merely a "plausible interpretation," would allow confirmation of a labor arbitration award, even where that arbitrator has ignored his own express factual findings in reaching that decision. The more rigorous standards applied by other courts of appeals would not allow such an occurrence.

The standard enunciated by the Sixth Circuit does not permit the mere analysis of the decision's bottom line to determine its plausibility. Rather, the Sixth Circuit requires a rigorous examination of the arbitration decision and will deny enforcement in situations where the arbitrator has failed to follow his own factual findings. For instance, in *International Brotherhood of Firemen And Oilers, AFL-CIO, Local No. 935-B v. The Nestle Company, Inc.*, 630 F.2d 474 (6th Cir. 1980), the Sixth Circuit reversed the lower court's confirmation of an arbitration award, where the arbitrator ignored his own finding that the grievant was insubordinate. This failure on the part of the arbitrator was fatal to his decision, and the court found no need to examine the decision's bottom line to determine whether or not the interpretation was "plausible."

The Fourth Circuit has a similar rule. For instance, in *Monongahela Power Company v. Local No. 2332, IBEW*, 566 F.2d 1196 (4th Cir. 1976), the arbitrator specifically found that the grievant in question engaged in a work stoppage in violation of the no-strike clause in the collective bargaining agreement. Paying little heed to this finding, the arbitrator nonetheless imposed his own limitations upon the employer's right to discipline for these violations. In so doing, the court held that the arbitrator overstepped his contractual authority.

The Eighth Circuit's rule is in accord. For instance in *Truck Drivers & Helpers Union, Local 784 v. Ulry-Talbert Company*, 330 F.2d 562 (8th Cir. 1964), the collective bargaining agreement enumerated specific offenses including, *inter alia*, dishonesty, which were grounds for discharge. After finding that the grievant engaged in the falsification of time records, the arbitrator nonetheless ordered reinstatement because the penalty was, in his view, excessive. The Eighth Circuit denied confirmation of the award because of the failure on the part of the arbitrator to take heed of his own factual findings.

Finally, in *International Union of Operating Engineers, Local No. 670 v. Kerr-McGee Refining Corporation*, 618 F.2d 657 (10th Cir. 1980), the Tenth Circuit Court of Appeals affirmed the district court's vacation of an arbitration award. There, the contract provided for discharge for abuse or misuse of sick leave benefits. The arbitrator found that the grievant engaged in such misuse, but nonetheless ordered reinstatement.

If this more rigorous standard had been applied in the instant case, it is manifest that Arbitrator Eaton's award would have been denied enforcement. The arbitrator found

that on at least two occasions prior to the parties' April 1978 agreement on a new collective bargaining contract, the Publisher's bargaining representatives warned the Union's representatives that if any of the Union's members honored the Mailers' picket line, then the Union's members would be on strike, and in accordance with the Scanner Agreement, would lose their job guarantees. He also found that the Union's bargaining representatives neither disputed this admonition nor contested these interpretations of the Scanner Agreement. It is also undisputed, and the arbitrator found that the Union's representatives remained silent in the face of these statements by the Petitioner, and actually agreed with the comments of the Publisher's negotiators (App. D, p. D22).

By concentrating on the decision's bottom line, the Ninth Circuit necessarily overlooked that Arbitrator Eaton ignored his own factual findings of the parties' mutual intent. It is axiomatic that it is the purpose of arbitration to glean the intent of the parties as expressed in their collective bargaining agreement. By ignoring his own factual findings that the parties were in complete agreement that the term "strike" in the Scanner Agreement included sympathy strikes, the arbitrator did not remain true to his task but rather dispensed his own brand of industrial justice.

The exercise of this Court's supervisory authority is necessary here so that parties to collective bargaining agreements within the Ninth Circuit receive the same protections given those in other circuits, and are assured that labor arbitrators issue decisions which draw their essence from the collective bargaining agreement, rather than from the individual arbitrator's own notions of justice.

B. The Standard Articulated By The Ninth Circuit Is Contrary To The Standards Articulated In The First And The Sixth Circuits, In That It Would Permit Confirmation Of An Arbitration Award Even Where The Arbitrator's Findings Are Unsupported By The Record Evidence.

By concentrating on the arbitration decision's bottom line, the standard articulated by the Ninth Circuit below makes no room for a meaningful analysis of the record before the arbitrator in order to determine whether the arbitrator's decision has any factual support. That is, under this standard, an arbitrator would be free to ignore all of the evidence in the record, make findings of fact totally unsupported by record evidence, ignore clear and precise contractual terms and to dispense his own brand of industrial justice. Other courts of appeals do not view their role in reviewing arbitration awards as so circumscribed, but rather engage in a meaningful review of the evidence before the arbitrator to determine the existence of record support.

For instance, in *Storer Broadcasting Company v. American Federation of Television and Radio Artists,* 600 F.2d 45 (6th Cir. 1979), *cert. denied,* ..... U.S. ....., 70 L.Ed.2d 641 (1981), the company, prior to the advent of the union, had made voluntary payments into its own profit sharing plan on behalf of its employees. Thereafter, the company and the union entered into a collective bargaining agreement which required the employer instead to make these payments into the union's pension plan, the union having agreed that its members would cease to participate in all aspects of the prior pension plan. Recognizing the possibility for confusion, the collective bargaining agreement

contained a clause representing that the union had fully disclosed to its members the benefits being given up by them in consideration for the company's participation in the union pension plan, and that this arrangement was fully acceptable to the union and its members.

Thereafter, a dispute arose as to the amount of the pay out made by the trustee of the prior plan, the trustee paying the employees their vested benefits only, whereas some employees claimed that they should receive all contributions made on their behalf. The dispute went to arbitration and the arbitrator construed the language referred to above as binding the employer to whatever reasonable interpretation the union had made and communicated to its members. Finding that the union had told the members that they would be entitled to receive all contributions made on their behalf, not merely vested benefits, the arbitrator ordered the employer to pay these amounts. The Sixth Circuit ordered vacation of the award, finding no factual support for the arbitrator's factual finding that the union had made such representations to the employees.

If one were to apply the standard enunciated by the Ninth Circuit to the *Storer Broadcasting* facts, the result would have been far different, for the arbitrator's interpretation there certainly was "plausible" in light of the contract language; language which could be interpreted either way. It was only by going behind the conclusion of the arbitrator, to its factual support, that the Sixth Circuit avoided the unjust result.

Similarly, in *Detroit Coil Company v. International Association of Machinists & Aerospace Workers, Lodge No. 82*, 594 F.2d 575 (6th Cir. 1979), *cert. denied*, 444 U.S. 840

(1979), an issue arose as to the timeliness of the union's submission of the dispute to arbitration. The contract required that the employer and the American Arbitration Association be "notified" within eight working days of a specific act in order to select an impartial arbitrator. While the evidence was undisputed that the letter demanding arbitration bore a date that was within the eight-day period, the arbitrator found that the company did not receive the notification until after that period. Nonetheless the arbitrator let the matter be heard on the merits.

In reversing the district court's confirmation of the arbitration award, the Sixth Circuit noted that there was no evidence in the record to support the arbitrator's conclusion that the company and the union intended to expand the scope of the term "notified" to encompass the mere dating of the letter. Since there was no evidence, the arbitrator exceeded his authority in so holding.

If the Ninth Circuit's rule was applied to the *Detroit Coil* facts, the result would necessarily have been different, as the Ninth Circuit's rule does not contemplate any examination of the record before the arbitrator, nor does it contemplate any determination as to the existence of factual support for the arbitrator's findings. Examining the arbitrator's decision in *Detroit Coil* in a vacuum, it could certainly be said to be "plausible". However, according to the standard applied by the Sixth Circuit, the lack of factual support was fatal to the validity of that award.

The First Circuit enunciated a similar rule in *Electronics Corporation of America v. IUE Local 272,* 492 F.2d 1255 (1st Cir. 1974). There, the arbitrator modified the penalty imposed by the employer on the basis of his finding that the grievant had not received a final suspension prior to

discharge. After analyzing the record before the arbitrator, the court concluded that there was no factual support for the arbitrator's finding that there was no suspension; indeed, the undisputed evidence showed that the pre-discharge suspension had occurred. Since the erroneous factual finding constituted the basis for the arbitrator's decision, the First Circuit concluded that it must be vacated. The low standard for enforceability applied by the Ninth Circuit would necessarily have resulted in affirmation on a case presenting *Electronics Corp.* facts, as the only issue before the arbitrator was whether or not the termination was for just cause. Virtually any ruling by the arbitrator would have been a "plausible interpretation" of the contract.

In the instant case it is apparent that Arbitrator Eaton's decision referred to alleged facts for which there were absolutely no evidentiary support. For instance, page 15 of his decision states:

> A lifetime job guarantee is of extraordinary value to an employee, particularly in an industry of declining employment. If the parties had meant that this benefit was to be lost by honoring the lawful picket line of another union, the employees have a legitimate expectation in being so notified by appropriate contract language. In the scanner negotiations of 1973 the subject was not addressed. All that was said was 'strike,' and *that was all that was meant.* [Emphasis added].

Like the cases cited above, this discussion as to the parties' intent enjoys absolutely no support in the record. Indeed, his finding that the parties intended the term

"strike" to encompass only primary strikes is a mere figment of the arbitrator's imagination, without any factual support. It is only because of the Ninth Circuit's low standard for confirming arbitration awards that such a decision passed muster. Under the standards cited by the courts above, which require an analysis of the record bases for findings, vacation of the Eaton decision would have been mandated.

II

THE OPINION OF THE COURT OF APPEALS IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

As stated above, a reading of the opinion of the Ninth Circuit below makes it apparent that the court affirmed the district court's confirmation of Arbitrator Eaton's decision merely by deciding that it constituted a "plausible interpretation of the contract." It is submitted that such a standard understates a court's obligation in cases where a party seeks confirmation of a labor arbitration award, contrary to the teachings of this Court. While it is clear that federal courts are not empowered to interpret substantive provisions of collective bargaining agreements, it is also clear that it is the obligation of the courts to examine the arbitrator's words carefully to be certain that the arbitrator remains faithful to his duty to interpret and apply the collective bargaining agreement. *United Steelworkers of America v. Enterprise Wheel and Car Corp., supra,* 363 U.S. at 597.

Thus, the cornerstone of the standard enunciated by this Court is the *means* by which the arbitrator reached his results. Courts are not to deal with the merits of the

dispute, so long as the arbitrator looks to the collective bargaining agreement as the source of his decision.

On the other hand, the standard applied by the Ninth Circuit is reverse. Under that standard, it does not matter how the arbitrator reached his decision, so long as the bottom line represents a "plausible interpretation." Application of this standard sheds no light on whether the arbitrator remained faithful to his duty to interpret and apply the collective bargaining agreement, or whether his decision was based on extraneous factors. This "plausible interpretation" standard is extremely easy to meet, and gives arbitrators almost free rein to make decisions without regard to the record and without regard to the intent of the parties as expressed in the collective bargaining agreement. Decisions based on passion, supposition, unsupported inference and the individual arbitrator's own notions of industrial justice would be permissible.

As stated by this Court, it is present federal policy to promote industrial stabilization through collective bargaining agreements and a major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in those agreements. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960). This policy depends upon voluntary contractual agreements to submit disputes to arbitration. Only if parties can be assured of some means of confining arbitrators' decisions to interpretation and application of the collective bargaining agreement are parties likely to commit themselves to binding arbitration of disputes. A system in which arbitrators are free to transgress their legitimate bounds deters rather than promotes use of this important voluntary dispute resolution mechanism.

To allow the Ninth Circuit's "plausible interpretation" standard to remain is to deny employers and unions within that circuit the right to be assured that labor arbitrators stay within their legitimate bounds of interpreting and applying the collective bargaining agreement.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: October 22, 1982

Respectfully submitted,

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(Appendices follows)